The BAR ASSOCIATION BULLETIN

Entered as second-class matter, April 13, 1926, at the Postoffice at Los Angeles, California, under the Act of March 3, 1879

Volume 5, Number 6 FEBRUARY 20, 1930 10c a copy $1 a year

Official Publication of the Los Angeles Bar Association, Los Angeles, Cal.

In This Issue

THE CITIZEN AND THE JUDICIARY
Judge Leon R. Yankwich

THE PRESIDENT'S PAGE

LAW AND THE LAYMAN
Max Radin

FORMING CORPORATIONS UNDER 1929 AMENDMENTS
Reuel L. Olson

CASE NOTE
Harry Graham Balter

BOOK REVIEW
William E. Balter

BAR ASSOCIATION ANNUAL MEETING

Thursday, February 20, 1930

See Page 177 for Particulars

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

The BAR ASSOCIATION BULLETIN

VOL. 5 FEBRUARY 20, 1930 No. 6

Published the third Thursday of each month by the Los Angeles Bar Association and devoted to the interests of the Association.

HOWELL PURDUE, *Editor*

Bulletin Office: 821 Title Insurance Bldg., Los Angeles. Telephone MUtual 6457

LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

Secretary's Office: 1126 Rowan Bldg., Los Angeles. Telephone VAndike 5701

MEMBERS ARE REQUESTED TO PATRONIZE THE BULLETIN'S ADVERTISERS

The Citizen and the Judiciary

By The Honorable Leon R. Yankwich, J.D., LL.D., *Judge of the Superior Court, Los Angeles County.*

Author of

California Pleading and Procedure, and *Essays in the Law of Libel.*

"The loss of public confidence in our (the courts') integrity would be a calamity little less than the loss of official integrity itself. The pomp and circumstances which in England aid to clothe the courts and the law with dignity and power are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith and the moral influence of the courts is gone, and popular respect for law impaired. Law with us is an abstraction. It is personified in the courts as its ministers, but its efficacy depends upon the moral convictions of the people. When confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime.

"The one element in government and society which the American people desire above all things else, to keep free from the taint of suspicion, is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people and the object of its social organization has failed. The protection of life, liberty and prosperity is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws; but unless they are honestly administered, neither life, liberty, nor property enjoys the security which it is the object of government and society to give. If the time shall unhappily ever come when the judiciary of this state has become hopelessly corrupt, and justice is bought and sold, the loss of its moral and material well-being will as certainly follow as the night follows the day."

These words of the Supreme Court of Illinois from a famous contempt case (People v. Wilson, 64 Ill. 258) emphasize the importance of the judiciary in our governmental system. This is due to the fact that our government is based upon the principle of the supremacy of the law — a principle which is expressed in the old legal saying, "The law is the highest inheritance which the King has, for by law he and all his subjects are governed and if there were no law there would be no King and no inheritance." This principle the founders of our government had in mind when they declared that this should be a "government of laws and not of men." Under such a system, the protection of life, liberty and property is not left to the whims and caprices of an individual, but is governed by rules of law applicable alike to all. Law is the common yardstick by which the relation of one citizen towards the other and the relation of all towards the commonwealth is measured.

The meaning of this principle, in its application, is:

1. No person can suffer loss of property or liberty, except for breach of law established in court;
2. No man is above law: "The King has a superior, to wit, the law, and if he be without a bridle, a bridle ought to be put on him namely, the law." (Attributed to Bracton.)

Speaking of the greatest significance of the Magna Charta, Pollock and Maitland say:

> "It means this, that the King is and shall be below the law." (*History*, 2nd ed., p 173.)

And it has been said that the chief aim of the State is "to uphold the rule of law." (McIver: *The State*, p. 478.)

And what law is is, ultimately, determined by the judicial branch of the government. In final analysis, judges are our legislators.

In so designating them, I do so within the limits set forth by Mr. Justice Oliver

Wendell Holmes, in his often quoted dissent in Southern Pacific v. Jensen, 244 U.S. 221:

> "I recognize, without hesitation, that judges do and must legislate, but they can do so only *interstitially; they are confined from molar to molecular action.*"

The judge, as Judge Cardozo says,

> "* * * is not to innovate at pleasure He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion, informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains." (Benjamin N. Cardozo: *The Nature of The Judicial Process,* pp. 140-141.)

As a part of their power of interpreting and applying the law to the questions presented to them, it becomes their duty (and it is a duty which they have exercised ever since the foundations of this government were laid) to declare a law to be no law at all if it conflicts with the fundamental law of the land, the Constitution. And even in applying well-established principles of law to particular cases, judges legislate. As new conditions arise judges take old precepts and principles and adapt them to new conditions. New law arises and herein lies the excellency of our system. Law becomes a part of life. In a changing world—in a world in flux—it also is in flux. Law instead of being a fixed static thing becomes a living, changeable entity, aiming to satisfy the needs of human society. It thus becomes what Dean Pound calls "a continually more efficacious social engineering." (*Introduction to the Philosophy of Law.*) Law grows with the life about it. In true pragmatic spirit it grows out of repeated trials and errors. Because of this in no country of the world has the judiciary the power that our judges have. This great power implies a responsiblity as great. On the part of the judges it is to be not only like Caesar's wife, "above suspicion," but to be imbued with the growing spirit of the law. The principles of justice and liberty are the same, but as conditions change and new problems arise law also must change. It must adjust itself to meet the new conditions. Social security demands that those who occupy judicial positions give expression to this conception of law as growth.

Zechariah Chaffee, Jr., has thus stated the prbolem:

> "Legal power is much; it is not all; but the important residuum in the equipment of a great judge is not, I believe, the possession of this or that political or economic or social view, but the desire to understand *human life as well as embalmed legal experience.*
>
> "The problem of the judiciary is, therefore, not the selection and easy removal of judges on a political or class basis, but the question, what methods will make it easier to place men of this legal and ultra-legal power on the bench, and after they are there will enable them to keep in *continuous fruitful contact with the changing social background out of which controversies arise.*" (*The Inquiring Mind,* p. 265.)

Only by applying such a conception can we hope to achieve the high aim of justice as expressed in the old maxim, "The constant and perpetual will to give every one his due." Any other conception of law and judicial process results in making lawyers "their clients' keepers," and turns judges into mere technicians. On the part of the citizen the responsibility resulting from these principles is equally great. The chief responsibility of the citizen lies in selecting men for judicial office who are possessed not only of learning and integrity, but also of this high conception of law which makes judges social engineers and not mere narrow technicians. Their duty does not end there. Good citizenship requires that they guard with jealousy the integrity of the judiciary. Theirs is the duty to overcome the feeling that the scales of justice are not evenly balanced.

The administration of justice is a complex problem. To achieve the ideal of evenly balanced justice we need the aid of an enlightened — i.e, an intelligent, — not an aroused, public opinion. There are heard in many quarters utterances blaming courts for failures for which they are not responsible; particularly so far as the administration of criminal justice is concerned the tendency is to blame courts for the failure to deal with the problem of crime effectively. This arises from the fact that people misconceive the function of the judge in such cases. To hear some people talk one would think that it is the duty of courts when a crime is committed to arrest the

criminal, to prosecute him and to see that he is convicted. And if a crime which arouses public resentment is committed the average reaction of the citizen is, "Why do not the courts do something about it?"

Judges are not policemen; nor are they prosecutors. They are not responsible for the failure of police departments to arrest criminals; nor are they responsible for the failure of prosecutors to prosecute criminals. Their function, so far as the administration of criminal justice is concerned, is, as it has been put, "to hold the balance nice, clear and true between the people and the defendant." And that is their sole function.

This fact is, sometimes, lost sight of. But just as the test of Christianity lies in the application of the principle, "*In so much as ye have done unto the least of these, my brethren, ye have done unto me,*" so does the test of our rule of law lie in the manner in which it safeguards the rights of those who come in conflict with the law. Such is the traditional view of our common law system, which makes the presumption of innocence the heritage alike of all, the good and the evil, the just and the unjust.

There is wisdom and real, fundamental American constitutionalism in the statement of Mr. Justice Oliver Wendell Holmes:

> "For my part, I think it a less evil that some criminal should escape than that the Government should play an ignoble part." (Olmstead v. U. S., 277 U. S. 470.)

And the government, which means all of us, plays an ignoble part whenever it allows any of its officers, in their zeal to apprehend, prosecute or convict persons accused of crime, to violate any of the rights guaranteed to them,—which rights are the glory of our common law heritage.

Ultimately our liberties are wrapped up in the persons of those who come in conflict with the law. If these rights are denied them, they cease to exist for us all. And if the judge does not protect the accused in these rights,—and secure them for him,—no one will.

Prosecutors are interested chiefly in records of conviction. Few (the exceptional ones only) are interested in the *manner* in which convictions are secured. It is the province of the trial judge to supervise *the manner* of conviction. For the prosecutor's trampling on the rights of the accused,—for his misconduct—the judge is held responsible. If there is a reversal for such misconduct, it is the judge's judgment, following the verdict, which is sacrificed on the altar of the prosecutor's vanity or incompetence. And the commonwealth is the sufferer. The judge, by living up to his true function, by *upholding the rule of law,* helps the commonwealth. The judicial record of California shows that our judges have performed this function effectively.

The biennial report of Attorney General U. S. Webb filed on February 16, 1929, shows that during the two years just past 17,616 criminal charges amounting to felonies were filed in California courts. Only 1,202 resulted in acquittals. Twenty-one convicted murderers were sentenced to pay the death penalty. Three thousand nine hundred and eleven persons convicted of felony were sentenced to State prisons and 2,363 to other institutions. Of the total number charged with felonies, 8,403 defendants pleaded guilty. One thousand seven hundred and eighty-five were convicted in the courts and the balance await disposal of their cases.

On a percentage basis of conviction, 63 percent of the persons charged with felonies were convicted by trial during the period of 1922-1924; 69 percent during the period of 1924-1926; and 60 percent during the period of 1926-1928.

During this latter period 518 criminal cases were appealed, the percentage of affirmances on appeal being 80.1 percent.

The great complaint in years past against our appellate courts for setting aside verdicts of conviction on narrow, technical grounds certainly finds no foundation in the activities of these courts in recent years. In fact, the pendulum has swung the other way. Trial courts have to be constantly reminded by appellate courts that the rights of the accused must not be disregarded in the desire to achieve quickness in the administration of justice.

This record is being improved by reason of changes made in our criminal law by the last two Legislatures. By their aid we are achieving more and more effectively the ideal of quickness and certainty of conviction in criminal cases.

But we cannot achieve this ideal by ourselves. The character of justice the community is receiving depends, to a large extent, on the character of the judiciary. But it also depends, particularly in criminal justice, to a great extent, on the cooperation of the citizenry. In criminal cases, juries,

which are a cross-section of our American life, determine exclusively the fact of guilt or innocence. They are the tryers of the facts. In the last analysis, the type and character of justice being accorded in criminal cases depend upon the type of juries that is being furnished. Next to the duty of voting there is no greater duty of the citizen than jury duty and yet there is none that is so easily shirked. If men and women of intelligence and responsibility hesitate to make personal sacrifices to perform this great social obligation the administration of justice suffers. A great responsibility is ours. In its accomplishment, we solicit the aid and co-operation of every citizen.

Interesting Mexican Decision

Our proximity to Mexico and our consequent close contact with the country will make of deep interest a recent decision handed down by the Mexican Supreme Court, according to Eugene Scanlan of the California Title Insurance Company. In this action the court ruled that "an unregistered foreign corporation, whether doing business in Mexico or not is precluded from bringing suit in Mexican courts unless and until it has registered in the Commerciat Registry" (File 380 of 1928).

Roger D. Moore, of the Division of Commerce, in reviewing the decision states that it, unless modified by statute or decree, may be expected to have far-reaching effect not only upon the nature of the rights of American corporations in industrial property in Mexico, but also upon their enforcing any rights through court action.

The plaintiff in the case was a Delaware corporation. Civil suit was brought for damages suffered by reason of infringement of the company's trade-mark, which had been duly registered in Mexico. The infringement had been tentatively established shortly before in another proceeding. The Supreme Court was asked to pass upon an application for "amparo" (a kind of injunction or staying order) against an intermediate appellate court in its decision, which had reversed upon appeal—during the pendency of which, proceedings in the main case were not suspended—a ruling of the trial court that the plaintiff company had capacity to maintain its suit. The highest court refused to grant the petitioned writ of "amparo," on the technical ground that same could not issue with reference to an interlocutory decision, and furthermore held the plaintiff had no standing in Mexican courts, by reason of having no existence in Mexico.

In rendering its decision against the American corporation the Court ruled that: "In order for a foreign company to have juridicial existence in the Republic it is necessary for it to comply with all the requirements imposed by law, as it is not sufficient that the same has been constituted in accordance with laws of the country in which it was organized; without fulfilling these requirements it cannot properly be said that the foreign company is subject to rights and obligations in Mexico. The registration of a mercantile company is obligatory because . . . mercantile registration constitutes the only proof of juridical existence and of true civil status."

The court further ruled that to bring suit foreign corporations must meet the requirements of article 19 of the Commercial Code, which makes registration obligatory upon all mercantile companies. In conclusion, the court observed, according to Mr. Moore, that "even though the above noted reasons would lead to a denial of the 'amparo' requested, as did the fact that 'amparo' is not properly allowable from an interlocutory decision, 'plaintiff is not absolutely deprived of his rights to initiate the suit . . . after having complied with the legal requirements.' It is therefore to be gathered that the court conceived the bare right to a trade-mark to be derived by complying with the trade-mark law, and as being distinct from rights looking to its enforcement by a foreign corporation."

The President's Page

REDUCING EXPENSES

Fellow Members,
Los Angeles Bar Association:

It is axiomatic that time is money. This truism is particularly applicable to the legal profession.

Among the measures enacted by the last Legislature, two are of especial significance to the lawyer, and in addition to the clients proved methods of practice which if utilized by the profession will save considerable time to the lawyer, and in addition to the clients and witnesses.

At the last session of the Legislature, section 2009 of the Code of Civil Procedure was amended so as to authorize an affidavit to be used as "evidence in an uncontested probate proceeding, including a proceeding relating to the administration of the estate of a decedent, also a proceeding relating to the administration of the state of a minor or incompetent person after a guardian has been appointed therein."

In addition, Code of Civil Procedure section 166 was amended, in part, so as to authorize a judge *in chambers* to "hear and determine all uncontested actions, prcoeedings, * * * other than actions for divorce, maintenance or annulment of marriage, and except, also, applications for confirmation of sale of real property in probate proceedings."

Accordingly, if the profession will avail itself of the time saving methods thus authorized by these two amendments; in other words, if the applications in uncontested probate proceedings are presented in the form of affidavits, it will be unnecessary for either the attorneys or their clients or any witnesses to spend any time attending court, and likewise the court will be enabled to dispose of such proceedings informally as chambers matters.

These amendments afford to the California lawyer many of the advantages now enjoyed by the profession in a number of other jurisdictions, notably in New York, Chicago, Cleveland, Boston, Baltimore and Toronto.

Obviously, such time saving methods mean reducing the expenses of the lawyer and correspondingly increasing his net income.

It is equally clear that if the bar will avail itself of this improved method of probate practice, the court will be enabled to dispatch expeditiously and with the least possible expense that portion of its business which is informal routine in character. Thus proceedings which now consume several hours each day will be dispatched by the court within a period of a few minutes.

GUY R. CRUMP, *President.*

DON'T FORGET YOUR EMPLOYMENT DEPARTMENT

Members who are in need of office assistants are urged to 'phone the office of the Secretary of the Association.

The Association has on file at the present time a goodly number of employment applications of attorneys recently admitted, and a few applications of experienced practitioners. All 'phone calls and other communications will be treated in a confidential manner.

Your co-operation will be appreciated.

J. L. ELKINS,
Acting Secretary.

A Message to Former Chief Justice Taft

The readers of the BULLETIN will be interested in the following telegram and the reply to it:

"Los Angeles, California.
"February 6, 1930.

"Honorable William Howard Taft,
"Washington, D. C.

"The Los Angeles Bar Association is mindful of the many great services rendered by you to the nation and especially to the legal profession, and expresses the affectionate esteem in which its members hold you, its appreciation of your distinguished services and its earnest hope for your quick restoration to health.

"Board of Trustees
"By GUY R. CRUMP, President."

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

"February 7, 1930.

"My dear Mr. President:

"Mrs. Taft has asked me to convey to the Los Angeles Bar Association an expression of her sincere thanks for the kindly message of sympathy sent to the Chief Justice.

"Sincerely yours,
"WENDELL N. MISCHLER,
Secretary to the Chief Justice."

"Mr. Guy R. Crump,
"President, Board of Trustees,
"Los Angeles Bar Association,
"Los Angeles, California."

Schedule of Fees, Marshal's Office

(*Furnished by the courtesy of* CHARLES R. THOMAS, *Marshal*)

For serving summons and complaint, for each person served, $0.50.

For levying writ of attachment or execution or executing order of arrest, and for the delivery of personal property, $1.00.

For a keeper when necessarily employed in keeping personal property, $4.00 per day.

For serving any writ, notice or order, except summons and complaint, or subpoenaes, for each person served, $0.50.

For writing and posting each notice of sale of personal property, $0.25.

For collecting money on execution, 1½ per cent.

For furnishing notice of publication, $0.25.

For serving subpoena, each witness, including copy, $0.25.

For executing and delivering certificate of sale, $0.50.

For executing and delivering Marshal's deed, $1.50.

For each mile actually travelled within the city for the service of any writ, order or paper, going only, $0.25 per mile. For travelling outside of the city for the service of such writ, order or paper, in going only, $0.15 per mile.

The Marshal's Department requries a deposit of $50.00 where a keeper is necessary in an attachment matter; where a keeper is used with an execution, $35.00 is the deposit. For an attachment or levy upon an automobile, a $25.00 deposit is required. Where the plaintiff furnishes his own dray in the case of a claim and delivery action, the deposit is $10.00. The attachment of real estate within 10 miles requires a deposit of $10.00.

Law and the Layman*

By MAX RADIN, *Professor of Law, University of California*

Law was defined by Blackstone as a rule of conduct commanding what was right and forbidding what was wrong. He took the essence of this from Cicero, but wherever he got it it is a bad definition and has frequently been shown to be bad. It is further a mischievous and dangerous definition. It inflates lawyers; it incenses laymen. It causes a serious maladjustment of means and ends in the community. But laymen, even more than lawyers, persist in thinking of law in this way, and they do so even when they are unaware of Blackstone's definition and scarcely know who Blackstone was. We have got into the habit of thinking of our communal and social activities as regulated by laws, much as nature is regulated by laws. And while we are ready to admit that a great many of our civil laws are imperfect and need amendment, the term law itself is one that seems to cover the whole of society. We speak of it with reverence and we like to think that we are a nation founded on law as on an immovable rock.

Now, the difficulty with all this is that it is poetry and metaphor and as widely removed from facts as it can be. The great body of our social activities has nothing to do with law. We say, for example, that law requires the observance of contracts and the abstention from murder. But it is not really so. Certain promises which we make we call contracts and fell obliged to keep, but that is because most people—especially business men — find it convenient to keep these contracts and have got into the habit of doing so and not because the law requires it. If it were not the fact the overwhelming majority keep their contracts, there would be no law about it whatever. Again, we do not refrain from murder because the law forbids it. It is because we have developed a community in which the vast majority have no impulse to commit murder or rather have a strong impulse not to commit it. These things are the products of social habits and a long — a tremendously long — history. We keep our contracts and we refrain from murder because we are that sort of people.

But there are some who are not that sort. And that is where law comes in. These exceptional people amount to a fraction of one per cent of the population. They form a thin and jagged margin around the sphere of society. The law consists in the means necessary to remedy the disturbance they cause. The law is good when it succeeds in reducing this margin to a minimum. It is a bad law when the margin is not so reduced.

We must remember that by making our society highly organized and centralized, we have created a delicate psychological mechanism. The margin in which law operates is minutely small, but it gets very nearly to the limit of our tolerance when it reaches one per cent or even approaches it. One per cent would be just about the utmost we could bear without feeling the situation unendurable and in many communities, far less than that would seem unendurable.

Just how unendurable it is, we can see from a little reflection on facts. Our jail population is at present a little over one-tenth of one per cent of our total. And we certainly have not learned how to manage that number very well. Suppose it were ten times as great. We can easily see that the problems we have so far rather imperfectly solved would be multiplied by at least that number. And even ten times would bring the figure only up to one per cent.

Similarly, if one out of every hundred of the billions of contracts that are made every year in the United States were broken, it would mean either that there would be no credit given or that an enormous increase of price would be made on all commodities. Either result might wreck our whole economic system.

The law, then, which is so fondly supposed to uphold our whole social structure is in fact found only along the very edge of that structure. How does it funtion there?

Perhaps we had better change our metaphors and think of law in terms common enough in another profession, that of medicine. We call in a doctor when there is a

*Reprinted from *The California Monthly.*

disturbance of our normal bodily activity. We expect him to find out what the matter is, to diagnose our ailment, and then to guide us in readjusting ourselves. He, too, is interested primarily in the pathological margin of our life, not in its normal functioning.

Of course, he must know what the normal conditions are, he must know the anatomy and physiology of the human body and know them thoroughly.

That is what we ask of our legal experts —under which name we think primarily of courts and lawyers, although we shall have to extend the form. We wish them first to diagnose the situation. They are to say whether anything is wrong and what is wrong. And again, like physicians, they will indicate the remedy, but it is a different set of men, marshals, sheriffs, policemen, clerks, registrars and the like who will carry it out, if those affected will not do so themselves.

So far the analogy works. But all such analogies break down sooner or later and this is no exception. A doctor makes his diagnosis, and if the inferences he draws are not borne out by subsequent events, he changes his diagnosis, and makes a new one. The diagnosing machinery of the law —that is the court—cannot do that. When it has found the malady and indicated the remedy, there is nothing more to be done.

And there is another wide difference between law and medicine. The facts which the physician has to deal with are in part unmistakable. But the facts with which the lawyer deals are past occurrences about which it is difficult—really impossible—to find the truth. He has to go about finding this truth in a definite way and then has to adjust his remedies in a definite way. And our communities have come to believe that a definite, regular and orderly way of going about it is better than any other, even if it seems sometimes rigid and inflexible.

This orderly and systematic way in which the principal part of our legal machinery —the courts—must act is a very complicated thing. It is idle to say it should be simple; just as idle to say that a surgical operation might so be simple. Simple ways in law will not work for us. They have been tried often enough. They still are tried in nomadic and tribal communities where life is more uniform and where a single person is at once judge, jury, sheriff and ruler. But they will not work with us and we have no choice but to have the highly diversified and complicated cases which occur in this margin of social maladjustment settled by a complicated machinery.

The court, however, is only one part of this complicated machinery. There are several others of which the two most important are the police and the government. The function of the police is to keep order by cowing or by punishing the small minority who will not do so. The function of the government is to administer the affairs of the political corporation called the State, which like other corporations needs a board of directors. Keeping order and running a corporation are really not necessarily connected with the function of diagnosing and remedying social disturbances. The thing that brings the law, with its characteristic institution, the court, into all this is the possibility that the police have not acted properly or that the government has not done so. Somebody must decide it, if that question is raised, and that somebody is the court. And indeed we make it a special boast of our system that we have a method of doing this very thing, and for generations Englishmen and Americans have felt superior to those nations who had to submit to police and government without being able to call the court in.

But an additional complication comes in the fact that the court which passes on the acts of the government is for many purposes itself a subordinate part of that government and subject to its direction. And it is precisely in those matters which are the court's particular and proper business, that is the readjustments necessary in the margin of social life, that the government is apt to give most of its directions, by means of statutes.

These statutes have got themselves called laws and have therefore surrounded themselves with a little of the glamour which invests the word law, and also unfortunately have roused most of the false expectations which the word law engenders. They are really addressed to courts and magistrates, although in terms to every one, and they are often extremely hard to understand because our boards of political directors simply will not take the trouble to frame them carefully and with competent advice.

And this exaggeration of ordinances which are really directed to judicial officers who seek to keep the margin of social pathology as narrow as may be, this imposing

upon practical regulations designed for practical purposes, a name shared with almost unvarying natural phenomena, has puffed up our legislatures as it has puffed up lawyers, and has made them suppose that by issuing a statute they could force courts and police to function not only within the margin, but really at the very heart of society, that they could mould the social structure. Obviously society can change—and sometimes very quickly change — so that what was formerly common and general shall be found only in the pathological and unsocial margin of which we have spoken. But if society does so, it will not be because the legislature has ordered it to, but for other reasons.

The courts therefore and the legislature who between them have so much to do with the law must first of all learn the lesson of modesty. They can no more make rules for society—all society—than a physician can reverse the circulation of the blood. But the layman must also learn in respect of the lawyer that lesson of modesty which he has found it easy enough to learn toward the engineer, the physician, the chemist, towards any other professing expert.

Lawyers are unpopular and the reason is obvious. If lawyers are professed experts in right and wrong, the aggrieved layman who must pay whether he is right or wrong, always resents the existence of such experts. Is he not himself the best of such experts, since he is obviously right and his adversary obviously wrong? That is not the whole of the story, but it is a large part of it.

But if we remember the proper function of the lawyer, both on the bench and at the bar, we ought to rid ourselves of this aged and senseless grudge. The lawyer has the task of running a highly specialized type of social machinery fitted for a special task. Its specialization is one of the particular qualities of the society in which we live. Much can be done to improve it—and it is being done by lawyers—but it really cannot be made simple or be turned into something that any man with common sense and good will may handle. Common sense and good will are not enough to perform an operation for appendicitis, or to build a bridge across the bay. One needs for these matters a careful and lengthy training. It ought to be obvious that it is as necessary for lawyers.

That the persons who are caught in those marginal and abnormal transactions which is the law's business, suffer from that fact is indubitable. The law will not make them whole even when the courts decide for them. In the same way they will not be compensated for the pain and expense of a serious disease even if they are cured. But the fact of having become entangled in those marginal transactions, of having made a contract with a dead-beat, or of having been attacked by a thug, that is a misfortune for which social conditions are responsible, not the law, just as becoming the host of a colony of streptococci is not to be charged to the medical profession.

Law as the subject of a technical profession is not the lofty and grandiose thing that people suppose. It is the sum of the methods which courts and governments and officials employ. It is the business of the lawyer to learn these methods. Any one can learn them. There is no mystery about it. But it takes time and effort. And one of the first things the lawyer learns—which the layman seems unwilling to believe—is the essential limitation of the power of courts and governments and machinery generally.

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

LOS ANGELES BAR ASSOCIATION

ANNUAL MEETING

Thursday, February 20, 1930 — 6:00 P. M.

CHAMBER OF COMMERCE

An especially interesting program is planned for this, the final meeting over which HONORABLE GUY R. CRUMP will preside. He will make his annual report and present the gavel to the incoming President.

HONORABLE CHARLES A. BEARDSLEY
President of The State Bar of California, will speak on the subject
"Making the Bar Respected."

DOUGLAS B. MAGGS

will speak on a subject of particular interest at this time:
"Government by the Nine Old Men in Washington."

Practice before, and recent events in, the United States Supreme Court, and the significance of the recent change in the Chief Justiceship, will be discussed.

Mr. Maggs, a recognized authority and author on Constitutional Law, was former Editor-In-Chief of the California Law Review and first Editor-In-Chief of University of Southern California Law Review. Before going to Columbia University, New York City, to teach Constitutional Law, he practiced law in San Francisco with Garrett McEnerney.

THOMAS C. RIDGWAY

last President of the California Bar Association, and subsequently President of the State Bar of California will discuss briefly the important and interesting work that is in progress, of the new CALIFORNIA CODE COMMISSION, of which he is Chairman.

INSTALLATION OF OFFICERS AND TRUSTEES

The report on election of Officers and Trustees will be presented and they will be installed in office. Come and greet your new Officers and Trustees.

Guests of Members are Welcome — Informal — Dinner $1.50

Program Committee:
KIMPTON ELLIS, Chairman
FLORENCE M. BISCHOFF
LOUIS G. GUERNSEY
JUSTIN MILLER
HON. CLAIR S. TAPPAAN

Points to be Kept in Mind in Forming Corporations Under Amendments of 1929**

By REUEL L. OLSON *of the Los Angeles Bar**

(Continued from December Issue)

Shares Without Par Value. Although Civil Code section 290b, as amended in 1929, has but three paragraphs, there are in reality seven distinct ideas set forth therein. Expressed in analytical form, the section would appear as follows:

Any corporation having shares without par value may issue such shares.

1. Subject to any limitations in the articles of incorporation, or any amendment thereof.
2. For such amount of consideration as may be determined from time to time by the board of directors, with due regard to the interests of existing shareholders.
3. Such shares shall be deemed fully paid when such consideration (as determined by the board of directors with due regard to the interests of existing shareholders) has been received by the corporation.
4. Capital.
   a. All consideration for shares without par value shall be credited to capital in the absence of designation as paid-in surplus.
5. Paid-in Surplus.
   a. That part of the consideration received by the corporation designated by the directors or shareholders, as the case may be, at the time that they determined the amount of the consideration, is to be treated as paid-in surplus rather than as capital.
   b. Amounts of surplus paid in by shareholders shall be shown on the books of the corporation as a sepaarte item designated "paid-in surplus."
6. The capital of corporations which issue shares without par value is subject to the provisions of Civil Code section 309 and 309½ as to "capital stock."
7. Each share without par value shall be equal to every other share, subject to preferences granted in the articles.

Deering's edition of the Civil Code prefixes section 309 with the heading: "Limitations on Directors of Corporations; Liability." This heading does not adequately represent the subject matter of the section. A more nearly accurate statement would be: "Directors' and Shareholders' Limitations and Liabilities—Joinder of Parties Defendant."

A logically arranged analytical statement of Civil Code section 309, as amended in 1929, would appear as follows:

Directors' and Shareholders' Limitations and Liabilities—Joinder of Parties Defendant.

I. Directors must not make dividends unless first permitted or authorized so to do by the Commissioner of Corporations.
   A. Dividends shall be made only from the surplus profits.
      1. *Provided,* that dividends may be paid—
         a. Upon shares entitled to cumulative preferential dividends from paid-in surplus.
            (1) Holders of such shares shall be notified when dividends are paid from paid-in surplus.

II. Directors must not divide, withdraw, or pay, to the stockholders, or any of them, any part of the capital stock.

**Associated with the firm of Hunsaker, Britt and Cosgrove.*

**AUTHOR'S NOTE: *While stated in the author's note to the first installment of this article, which appeared in the December,* 1929 *issue of the* BULLETIN, *that Ballantine's* CALIFORNIA CORPORATION AMENDMENTS *frequently had been consulted, it should be emphasized that the installment, while embodying original research, in the main consisted of an abstract, for the convenience of attorneys, of the treatment of the same points in Professor Ballantine's authoritative work.*

In the present installment, I again wish to acknowledge the assistance of Messrs. Gaylord and Yoakum.

The incorporated portions of Ballantine's CALIFORNIA CORPORATION AMENDMENTS *are designated by quotations.*

A. *Excepting* that there may be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts.
1. Upon its dissolution.
2. Upon the expiration of its term of existence.

III. Directors under whose administration any wilful or negligent violation of these provisions (I and II) takes place, *are liable*.
A. *Except*:
1. Directors causing their dissent therefrom to be entered on the minutes of such directors at the time, are not liable.
2. Directors not present at that time are not liable.
B. Nature of liability.
1. In cases other than that of the insolvency of the corporation.
a. To the shareholders of such corporation.
b. To the full amount of any loss sustained by such shareholders.
c. Jointly and severally.
d. Director held liable is entitled to contribution.
(1) From the other directors.
(a) The other directors are liable prorata according to the number of such directors.
(2) From the shareholders who knowingly accepted or received any dividend or distribution not authorized by this title to be made.
(a) Such shareholders shall contribute in proportion to the amounts received by them respectively.
2. In case of the insolvency of the corporation.
a. To the corporation or its receiver, liquidator or trustee in bankruptcy.
b. To the full amount of any loss sustained by the shareholders or creditors.
c. Jointly and severally.
d. Director held liable is entitled to contribution.
(1) From the other directors.
(a) The other directors are liable prorata according to the number of such directors.
(2) From the shareholders who knowingly accepted or received any dividend or distribution not authorized by this title to be made.
(a) Such shareholders shall contribute in proportion to the amounts received by them respectively.

IV. Shareholders knowingly accepting or receiving any dividend or distribution not authorized by this title to be made, are liable.
A. In proportion to the amounts received by them respectively.

V. Joinder of parties defendant.
A. Any number of directors and stockholders may be sued in the same action.

Civil Code section 309½ was not amended in 1929. It relates to the distribution of capital stock or capital assets of a corporation among its stockholders.

Commenting on this section, Professor Ballantine, *California Corporation Amendments* (1929), pp. 13-15, passim, says:

"* * * The various crude sections of the former law as to shares without par value (sec. 290b, c, e, f and g and sec. 403) have been revised and condensed into sec. 290b. There was no provision in sec. 290b or elsewhere as to fixing the amount of consideration for which non-par value shares may be issued. This authority is now given to the directors as the normal rule, but the articles may provide otherwise and the control may be reserved to the shareholders. Due regard must be had to the interests of existing shareholders in fixing the amount of the consideration, and equity will doubtless intervene to protect the shareholders against a new issue at an unreasonably low price. (Bodell v. General Gas & Electric Corporation (Del.), 132 Atl. 442; Atlantic Ref. Co. v. Hodgman, 13 F. (2) 781; Berle, Studies in the Law of Corporation Finance, 82, 88.)"

* * * * *

"By the former section, * * * it was necessary to state in the articles the 'stated capital' with which the corporation would begin and carry on business, and the total consideration received for non-par stock was to be attributed to 'stated capital.' No part of such consideration could be reserved as paid-in surplus. Now, as under the Delaware Act, sec. 14, the directors may determine that only part of the consideration which shall

be received by the corporation for any of its shares shall be capital, and the excess may be transferred to surplus. It would seem that under the present law a company is free to credit to capital as small a part of the consideration for non-par stock as it sees fit. Notice must be given when dividends are paid on preferred shares out of paid-in surplus. (Sec. 309.)

"Under sec. 290b, as under many non-par stock laws, shares may be issued for property without fixing any value on the consideration in monetary terms. This is lax. (See Ohio Act, sec. 17.) It is advisable for the directors when authorizing the issue of non-par stock for property to adopt a resolution, as in the case of par stock, to specify in dollars what the property is, in their judgment, reasonably worth. This is advisable not only to protect the rights of existing shareholders, but because at least part of the amount received by the corporation must be credited on the books to capital which determines whether there are surplus profits available for dividends. (Wickersham, 37 Harv. Law Rev. 464, 476.)"

"By the Corporate Securities Act, sec. 4, the commissioner of corporations has power to deny a permit authorizing a corporation to issue and dispose of securities except in such amounts and for such consideration and upon such terms and conditions as the commissioner may in the permit provide. If non-par shares are being offered to the public at a certain price, say ten dollars per share, the commissioner would doubtless prevent the promoters of the corporation from taking such shares except at a similar valuation, or upon such conditions as to protect the public subscribers. He might also afford protection to stockholders and subscribers against having their shares unjustly diluted by subsequent issues at a lower price. Equity will by analogy to the doctrine of preemptive rights interfere to protect existing stockholders from an unjustified impairment of the values underlying their holdings by an abuse of the power of directors in fixing the price at which unissued non-par stock may be sold. (Berle, Studies in Corporation Finance, 82, 86.)"

From Professor Ballantine's reference to Civil Code section 290d, *California Corporation Amendments* (1929), page 15, one is led to believe that said section was amended in 1929. This is not the case. Civil Code section 290d, 1927, continues the valuation of non-par shares for the purpose of fixing the fee for filing the articles of incorporation (Pol. Code sec. 409) at ten ($10.00) dollars per share. Professor Ballantine cites the case of People of State of New York v. Latrobe (U.S., 1929), 49 Sup. Ct. 377, and International Shoe Company v. Shartel, (U.S., 1929), 49 Sup. Ct. 380, in support of the statement that a license or franchise tax may be based on the par value of shares, and on an arbitrary value assigned to non-par shares, regardless of their actual value or the amount paid for them.

Signature and Acknowledgment of Articles. The provisions of Civil Code section 292 (1929), when analyzed, appear as follows:

Signature and Acknowledgment of Articles.

1. Each person named in the articles as a director *must* sign and acknowledge same.
   A. Before officed designated by law as one before whom an acknowledgment may be made.
   B. If taken without the State—
      1. Any certificate of an acknowledgment must be authenticated by the certificate of an officer having the requisite official knowledge of the qualifications of the officer before whom the acknowledgment was made.

II. Persons other than those named in the articles as directors *may* sign and acknowledge same.
   A. But if such other persons do sign, their signatures must be acknowledged in the same manner.

Commenting upon the section, Professor Ballantine says:

"Only the persons named as directors in the articles are required to sign and acknowledge them. It is no longer required that a majority of the incorporators be residents of the state. See sec. 285.

"As to acknowledgments see Civil Code secs. 1180, 1181, 1189."—*California Corporation Amendments* (1929), 17.

The requirements under the old section, section 292 (1911), may be represented as follows:

Three or more persons, which number must include each director, must sign and acknowledge articles.

I. Before some officer authorized to take and certify acknowledgments of real property.

II. Majority of said three or more must be residents of this State.

Corporate Existence—Copy of Articles—

Name — Words "Trust" or "Trustee." Notwithstanding the fact that Deering's edition of the Civil Code uses the heading, "Secretary of State to file articles; Certified copy to be filed in county of principal place of business," to introduce section 296, it is submitted that a more nearly accurate heading would be, "Corporate Existence—Copy of Articles — Name — Words 'Trust' or 'Trustee'." The provisions of Civil Code section 296 (1929), may be arranged, in logical grouping, as follows:

1. Corporate existence.
   A. Shall begin upon the filing of the articles of incorporation.
   B. Shall continue for an indefinite term.
      1. Unless it be in this code otherwise expressly provided. (Under Civ. Code 296, 1923, corporate existence was limited to fifty years.)

II. *Copy* of articles.
   A. Certified by the Secretary of State.
   B. Endorsed with date of filing in office of Secretary of State.
   C. Filed.
      1. County clerk's office of county in which corporation is to have its principal office.

III. Name.
   A. Restriction on Secretary of State against filing name likely to mislead public or which is the same as, or resembles so closely as to tend to deceive:
      1. A name resembling the name of a domestic corporation.
      2. A name resembling the name of a foreign corporation which is authorized to transact intrastate business in this State.
      3. A name which is under reservation as provided in Civil Code section 296a—
         a. Unless the certificate of reservation is presented at the time of filing such articles, or
         b. Unless it is established to the satisfaction of the Secretary of State that said name was reserved for such use.
   B. Remedy in case articles are filed using name in violation of section—
      1. Use may be enjoined notwithstanding that corporation's articles may have been filed with Secretary of State.

IV. Words "trust" or "trustee" in name.
   A. Articles shall not be filed by Secretary of State unless certificate of approval of Superintendent of Banks is attached. (See related section, Civ. Code sec. 290a.)

Pertinent excerpts from Professor Ballantine on these matters follow:

"Indeterminate period of corporate existence. * * * The corporate life begins on filing the articles and continues for an indefinite or indeterminate period. If the shareholders wish a corporation to wind up its business they must proceed under the statutes relating to voluntary dissolution. * * *.

"The corporate name. * * * The Secretary of State has clear authority to refuse to file articles if the proposed name would be likely to mislead the public even though not similar to that of any corporation of record in his office. The Secretary has refused to file articles containing names resembling those of well known foreign corporations whose names are listed on the principal stock exchanges, e.g., 'General Motors.'

"Former sec. 290½ as to the use of the words 'trust' or 'trustee' is now incorporated in sec. 296 which requires the certificate of approval of the superintendent of banks. The absurd provision of sec. 290½ that 'no corporation hereafter formed shall accept or execute any trust' unless it is a trust company, is abolished. (See Bank Act, secs. 6, 90.)"—Ballantine, *California Corporation Amendments* (1929), pages 19-20.

Case Notes

By HARRY GRAHAM BALTER *of the Los Angeles Bar; Assistant United States Attorney.*

TAXATION—SITUS OF STOCKS AND BONDS FOR PURPOSES OF TAXATION. In the last issue of the BULLETIN we discussed the recent ruling of the United States Supreme Court in Safe Deposit and Trust Company v. Virginia, 280 U. S. 83, (Decided November 25, 1929). We took occasion to indicate the apparent difficulty which the Supreme Court had been meeting in reaching a definite rule to govern the taxation of intangibles where more than one State elected to exercise its alleged power or right to tax the same.

Speaking of the Safe Deposit Case, we summarized the situation by remarking:

"This case we feel has done much to unsettle any definiteness that there may have been in the Supreme Court's earlier decisions dealing with problems of taxability of intangibles." (BAR ASSOCIATION BULLETIN, Vol. 5, No. 5, page 151, issue of January 16, 1930.)

This problem seems to be reaching tremendous importance, for only during the last month the Supreme Court has again handed down a decision involving the taxability of intangibles—and again the court is divided in its own views.

The newest case dealing with this intricate problem is *Farmers Loan and Trust Company, as sole surviving Executor of the Last Will and Testament of Henry R. Taylor, Deceased, v. State of Minnesota,* Advance Opinion No. 26, decided January 6, 1930.

This was an appeal from the Supreme Court of the State of Minnesota. The facts were that Henry Taylor, while domiciled and residing in New York, died testate. He had long owned and kept within that State negotiable bonds and certificates of indebtedness, issued by the State of Minnesota, and the cities of Minneapolis and St. Paul. Some of these were registered and others were payable to bearer. None had any connection with business carried on by, or for, the decedent in Minnesota. All of the property was probated in New York, where the estate was administered, and the inheritance tax was paid. The State of Minnesota, under a proper statute, assessed an inheritance tax upon the same transfer.

The Supreme Court of Minnesota upheld the validity of the authorizing statute. The Supreme Court of the United States reversed this ruling.

The majority opinion was written by Mr. Justice McReynolds, who, it will be recalled, wrote the majority opinion in the Safe Deposit and Trust Case, *supra;* a concurring opinion, but on different grounds, was written by Mr. Justice Stone; a dissenting opinion was written by Mr. Justice Holmes, concurred in by Mr. Justice Brandeis.

The knotty problem is still that of determining the situs of an intangible. The whole difficulty commenced with the case of Blackstone v. Miller, 188 U. S. 189, when the Supreme Court held that an intangible may have more than one situs for the purpose of taxation—one at the domicile of the debtor and the other at the domicile of the creditor. This doctrine of Blackstone

v. Miller, *supra,* is now definitely rejected by the Supreme Court. Said the court in the majority opinion:

> "Blackstone v. Miller, supra, and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller no longer* can be regarded as a correct exposition of existing *law; and to prevent misunderstanding it is definitely overruled."*

The Supreme Court is obviously striving for a more simple rule for taxation of intangibles, and if possible, will endeavor to eliminate the principle that more than one State can tax the same chose in action.

As far as the Supreme Court is concerned, the following rules of taxation will now apply:

1. No State may tax anything not within her jurisdiction without violating the Fourteenth Amendment. (State Tax on Foreign Held Bonds, 15 Wall. 300; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194; Safe Deposit & Trust Co. c. Virginia, 280 U. S. 83.
2. No State can tax the testamentary transfer of property wholly beyond her power. (Rhode Island Trust Co. v. Doughton, 270 U. S. 69.)
3. No State can impose death duties based upon the value of intangibles permanently located outside her limits. (Frick v. Pennsylvania, 268 U. S. 473.)
4. Tangible chattels permanently located within another State cannot be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. (Frick v. Pennsylvania, *supra.*)
5. It is not permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. (Union Refrig. Transit Co. v. Kentucky, *supra;* Rhode Island Trust Co. v. Doughton, *supra;* and Safe Deposit & Trust Co. v. Virginia, *supra.*)

The right of one State to tax may depend somewhat upon the power of another so to do. (Southern Pacific Co. v. Kentucky, 222 U. S. 63.)

It is, therefore, clear that as far as the taxation of intangible choses in action is concerned, they can be taxed only at the domicile of the creditor and no longer at the domicile of the debtor.

> "While debts have no actual territorial situs we have ruled that a State may properly apply the rule mobilia sequuntur personam and treat them as localized at *the creditor's domicile* for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppresive taxation, is a matter of the greatest moment. Twenty-four years ago Union Refrig. Transit Co. v. Kentucky, supra, declared—'In view of the enormous increases of such property (tangible personalty) since the construction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a situs of its own for the purpose of taxation and correlatively to exempt it at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the

sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction."

Justice Stone concurred in the result reached by the majority of the court, but stated that it was sufficient for the purpose of the decision to hold that the tax under consideration was an excise or privilege tax imposed on the transfer of an intangible, and not a property tax; and that, inasmuch as to sustain a privilege tax, the privilege must be enjoyed in the State imposing it, the transfer being effected in New York by one domiciled there, it would be controlled by the law of that State. (Providence Savings Association v. Kentucky, 239 U. S. 103.)

Justice Stone expressed the view that there was no necessity for the court to deal with views on the problem of "double taxation," nor did he feel that the court ought to express its views as to whether or not earlier decisions, such as Blackstone v. Miller, *supra*, any longer express the present trend of the law, remarking,

"Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined."

Justice Holmes, who wrote the dissenting opinion concurred in by Justice Brandeis, expressed his now well-known views regarding taxation. A State has a right to tax merely because it protects and vitalizes the obligation. Although this theory may be sound in principle, in view of the two recent decisions discussing this problem and rejecting this principle, it is clear that the Supreme Court will not accede to any such proposition. In Justice Stone's concurring opinion, there would seem to be a sufficient answer to Justice Holmes' plea that Minnesota has a right to tax these intangibles because without that State's protection, the obligation would have no vitality. Said Justice Stone:

"Even though the contract transferred was called into existence by the laws of Minnesota, its obligation cannot be constitutionally impaired or withdrawn from the protection which those laws gave it at its inception. See Providence Savings Association v. Kentucky, 239 U. S. 103, 113, 144; * * *. And while the creditor may rely on Minnesota law to enforce the debt, that may be equally true of the law of any other state where the debtor or his property may be found. So far as the transfer, as distinguished from the contract itself is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. See Bullen v. Wisconsin, 240 U. S. 625, 631; * * *."

This case has done a great deal to clarify the uncertainty left by the decision in Safe Deposit and Trust Co. v. Virginia, *supra*, and if we accept the majority opinion as the rule of law to be adhered to by the Supreme Court in the future, a study of that opinion will simplify the situation. There is still a great deal to be done in clarifying many of the phases of law involving the interplay of the rights of one State as against another, and a thorough study of the principles of conflict of laws with a view of re-stating some of the fundamentals so as to harmonize them with modern economic conditions would well be worth while.

Indeed, the business world was quick to appreciate the full importance of this decision. In a recent issue of *The Wall Street Journal*, Seth T. Cole, counsel for the New York State Department of Taxation and Finance, characterized the decision in the Farmers Loan and Trust Company Case as "the most revolutionary decision affecting death taxes ever rendered by the Supreme Court of the United States." More of what Mr. Cole has to say: "At one sweep reciprocity became national in scope and constitutional reciprocity is now substituted for the brand heretofore sought after through State legislation. In my opinion it has done more to place death taxation in the United States on a sound basis than anything that has occurred since the tax was introduced here in 1797."

Mr. Cole raises the question whether the Supreme Court will rule the same way in a situation involving stocks instead of bonds. It would appear that no differentiation should be made along these lines.

Legal Comment on Current Events

Edited by Current Events Committee of American Association of Legal Authors.
(Reprinted through the courtesy of THE NEW YORK TIMES)

THE LAW OF ENGAGEMENT PRESENTS

So fickle are the human emotions and so lavish the impulses of the male of the human species under the influences surrounding courtship and engagements to marry that it is strange that the courts are so rarely resorted to in the class of cases which Lord Chancellor Hardwicke of England was once called upon to discuss (2 Atk. 409). The action was by a disappointed suitor to recover gifts made to his lady love. In considering the rights and obligations of the parties, the Lord Chancellor drew a subtle distinction between gifts made before an engagement to marry and those made thereafter. If a man makes presents to a woman to gain her favor, said the Lord Chancellor, he is in the position of an "adventurer," so that "if he will run risks and loses by the attempt, he must take it for his pains." Once his advances are accepted, however, the man is on a different footing. A practical element enters into the romance. "If she thinks it proper to deceive him afterward," said the Lord Chancellor, "it is very right that the presents themselves should be returned or the value of them allowed to him."

These rules, varied somewhat by the special facts and circumstances of each case, control such litigation to this day, and will no doubt have important bearing in the action recently brought by Count Leon de Volo of Italy against Miss Langhauser of California, who promised to marry the Count and then changed her mind. The two met while Count de Volo was working in Hollywood as a sculptor and artist in the motion picture colony. "My broken heart can never be mended," the Count is reported as saying. His depleted purse is perhaps another matter, as the action brought seeks to recover about $2,000 worth of gifts which the Count lavised on his financee.

It is a matter of common observation that many articles, sometimes involving considerable outlay, are exchanged between affianced persons in a sentimental spirit of giving, without any thought of attaching a definite condition to the gifts. The cases occasionally heard in the courts are not of this class. But when, as sometimes happens, a woman who is engaged to a man induces him to turn over his bank account to her or to present her with household articles of substantial value and then marries another man, the claim of the jilted one for the return of the gifts is sympathetically regarded by the courts (118 Misc. 558). In such cases it is not difficult to read into the transaction the condition that the donee should become the wife of the donor. This consideration failing, the presents must be returned.

DISPARAGING STATEMENTS BY LAWYERS

Because the public interests are believed to be promoted by the principle, the courts have frequently decided that a lawyer, in summing up his case to the jury, may reflect upon the character of the opposing party or his witnesses with the utmost severity without liability for slander. "His conclusions," said the Appellate Division of the New York Supreme Court in one case, "may be lame and impotent, his inferences far-fetched or feeble, but so long as they can be deemed to be possibly pertinent, so long are they protected" (60 A .D. 515). The test to be applied is whether the rhetorical statements have relevancy to the issues in the case, though a lawyer who abuses his privilege in this respect will injure his professional standing and in the long run lose clients and legal engagements. As was well said by Chancellor Walworth of New York in an early case, speaking of derogatory statements by counsel: "We must, therefore, be careful on the one hand that we do not restrict counsel within such narrow limits that they will not dare openly and fearlessly to discharge their whole duty to their clients, * * * and on the other hand we must not furnish them with the shield of Zeus, and thereby enable them with impunity to destroy the characters of whomsoever they please" (22 Wend. 410).

A case which occurred some years ago, illustrating the limits which may not be transcended, involved an application by petition made to the Governor of New York for the pardon of a Dr. Conrad, who had

been convicted in New York City of the crime of attempted abortion. The attorney for the convict was Asa Bird Gardiner, who had previously been District Attorney of New York County, removed from office by Governor Theodore Roosevelt. The petition, signed by Gardiner, contained among other matters, a characterization of the counsel for the New York County Medical Society, who had been instrumental in securing the conviction, as "an unprincipled, blackmailing, depraved scoundrel." Suit for libel was promptly brought against Gardiner and the right to prosecute the action was sustained, the court holding that the allegation was so plainly irrelevant that the defendant Gardiner could not possibly have supposed it to have any bearing on the issue of whether the prisoner was entitled to a pardon (165 A.D. 595).

Book Reviews

STUDIES IN THE LAW OF CORPORATION FINANCE; by Adolf A. Berle, Jr.; xvii and 199 pp.; 1928; Callaghan and Company, Chicago, Ill.

A myriad of "Guides to the Perplexed" have been written in an ambitious effort to explain the concept "corporation." The giant which has developed out of the simple Roman universitates has given rise to some of the most perplexing problems in the whole body of jurisprudence. Typical of its conservative gait, law has here, as elsewhere, lagged a pace behind the birth and growth of new situations and conditions having their origin in the expansion of the corporate idea. It has been a good many years since the relations of the corporation to its stockholders and the nature of their interests in the entity first became matters of commanding importance, but it is only recently that efforts to analyze and correlate them have been made. Books on corporation finance indicate this present day desire to determine and adjudicate property rights as between the participants in the corporate entity as distinguished from the power of the corporation to run its business as a whole.

Studies in the Law of Corporation Finance by Professor Berle is a splendid example of this newest trend. The book itself is a slim volume of less than 200 pages but it is surprisingly complete in its treatment. An examination of the chapter headings will reveal the subjects discussed: The Present Position of the Corporate Management; Non-Par Stock and "Bankers' Control"; Non-Par Stock and Control of Participation Rights; Non-Cumulative Preferred Stock and Control of Participation in Surplus; Participating Preferred Stock and Control of Contingent Dividends; Convertible Bonds, Stock Purchase Warrants and Control of the Value of Option Rights; Subsidiary Corporations and Control of Credit Resources; and Publicity of Accounts, Management Purchases of Stock and Control of Security Values.

Before one has read very far, he perceives that the chief function of the courts today in dealing with these subjects is to curb and limit the zealous efforts of corporate promoters and directors continually to reduce the rights and interests of stockholders in the management and assets of the corporation. For example, the law recognizes a preemptive right on the part of old stockholders to buy a ratable share when new issues are ordered and thus prevent a dilution of their original interest. Under the new tendency, as the author points out, charters of some corporations now expressly recite that such right shall be taken away; and in fact the stockholder at the time he first buys into the organization is made to waive his preemptive right. That the law will not countenance such tactics, despite popular belief, is maintained by Professor Berle, who cites a few choice cases in support of this position.

Another example of the restraining role of the courts in matters of corporation finance, is illustrated in the case of holders of non-cumulative preferred stock. It is popularly supposed that directors of a corporation, by arbitrarily refusing to declare a dividend in a particular year, can forever deprive the preferred holders of the right to that dividend. It is the author's position that courts of equity, in a proper action, will not permit the stockholders to be deprived of their dividends if there have been such earnings that a dividend *could* have been declared.

Of particular interest to California attorneys are the chapters dealing with non-par stock. While some of the views presented might not be applicable in California (especially in light of the Del Monte Power Company case) nevertheless the scholarly discussion of the relative positions of par stock and non-par stock as between each other and as far as subsequent issues of par or non-par stock are concerned cannot but be of great value.

The author might well have expanded his book into several volumes. As it is, the matters presented are so condensed that one must read slowly and carefully to absorb all the content. The book is written in law review style and not a word is wasted. Professor Berle modestly offers the book as only a "tentative study" calculated to present a few of the highlights of corporation finance. If the present volume is any criterion, no one is more eminently fitted to offer a complete work on this difficult subject than Professor Berle himself.

WILLIAM E. BALTER.


AGE
id
Calif.
1067